Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	CG Docket No. 02-278

COMMENTS OF ROBERT BIGGERSTAFF ON THE PETITION OF PAUL D. S. EDWARDS

Robert Biggerstaff hereby submits these comments as timely filed in the Petition of Paul D. S. Edwards for Expedited Clarification and Declaratory Ruling regarding the Commission's rules under the Telephone Consumer Protection Act (TCPA).

In introducing the TCPA, its author, Fritz Hollings, said:

> Computerized calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall.
>
> The telephone is a basic necessity of life. You cannot get along in this country if you do not have a telephone in your home. However, owning a telephone does not give the world the right and privilege to assault the consumer with machine-generated telephone calls. These calls are a nuisance and an invasion of our privacy.

137 Cong. Rec. S9840 (daily ed. July 11, 1991) (statement of Sen. Hollings); *See also*, 137 Cong. Rec. S16204 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings) ("It is telephone terrorism, and it has got to stop.") I urge the Commission that in any adjudicative decision, the intent of Congress and the broad remedial purposes of consumer protection are given precedence over private pecuniary interests that are counter to the purposes of the TCPA.

The Commission has noted that the "wireless number" must be provided "by the called

party to a creditor in connection with an existing debt" in order for a call made to that number by the creditor to justify a claim that subsequent calls to that debtor at that wireless number are made with "prior express consent." If the number was not a "wireless number" at the time it was given to the creditor, it would not comply with the Commission's own language. The plain language clearly requires that the number provided must be a "wireless number" and not a "land-line number that will later be ported to a wireless number."

Wireless numbers are different than land-line numbers. Land-line numbers are a fixed location. Wireless numbers are carried with a consumer, often 24 hours a day. Wireless numbers have various costs associated with them, either per minute, per call, or as part of what the Commission calls a "bucket" of minutes. Calls to a land-line number don't distract drivers, interrupt family outings, or invade classrooms. Wireless numbers are not listed in the phone book and are not available in traditional directory assistance. In the law, wireless phones are *explicitly* treated differently from land-line numbers. They are, simply, more private and deserving of more privacy protection than land-line numbers.

In addition, there are a number of facets and consequences that flow from a denial of the Petition that the Commission may not be aware of. For example, if the Commission denies the Edwards Petition, what happens when a consumer gives a number to a creditor that is later ported to a wireless number, but the debt is written off or sold by the creditor and is later acquired by a third party? The consumer may have given a wireless number to the original creditor based on other relationships with that creditor, based on that creditor's privacy policy, or based on other policies or promises to the consumer by that creditor (such as "We will only call this number if there is suspected fraudulent use of your credit card.") When the debt is acquired by a third

party, the consumer has not given his wireless number to the third-party, so that third-party creditor should not be permitted to place autodialed or prerecorded calls to that number.[1]

In short – express permission to call a wireless number with a prerecorded message or autodialer can not be transferred without consent of the consumer. If a creditor wants to be able to "transfer" permission to call a wireless number with an autodialer or prerecorded message, the creditor should put such a clause in its contract with the consumer. This is also consistent with widely accepted tenets of consumer protection law and adhesive contracts.[2] In fact, this was anticipated by the author of the TCPA:

> The substitute [bill] also allows consent [for automated calls to cell phones] to be given orally, in writing, electronically, or by any other means, as long as the consent is expressly given *to the particular entity making the call.*

137 Cong. Rec. 16206 (statement of Mr. Hollings) (emphasis added).

In addition, many creditors operate 800-numbers for their customers to call. Creditors then capture, via ANI or CallerID, the source phone number from which the customer called. Creditors then consider such a number as having been "provided to" the creditor under the Commission's rules. However, the Commission has not permitted "capturing" of phone numbers to be a precipitating act for calls to the consumer at the captured number:

> However, if a caller's number is "captured" by a Caller ID or an ANI device without notice to the residential telephone subscriber, the caller cannot be

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[1] A different result would be presented when the original creditor retains an agent to make the calls, as long as an un-rebuttable agency relationship existed between the creditor and the collector. If the relationship is one of an independent contractor, however, the former analysis would apply. This would end the Kafkaesque practice of the industry that seeks to avoid liability for calls by hiring a third-party contractor to make the (illegal) calls, but then attempt to interpose defenses that the consumer gave the principle permission to make such calls. The third party can't be an agent for purposes of using express consent between the consumer and the principle, but an "independent contractor" for purposes of liability when the calls were made "on behalf of" the principle.

[2] I note that in recent news reports, several credit card companies, such a American Express, are doing so. I have also personally seen such clauses in credit card contracts.

considered to have given an invitation or permission to receive autodialer or prerecorded voice message calls.

1992 TCPA Order, 7 FCC Rcd at 8769,¶ 31 *See also, Declaratory Ruling*, 23 FCC Rcd. 559, 564 n34 (2008) (ruling on request of ACA International for clarification and declaratory ruling).

Another facet of this issue, is the inability of the consumer to stop pre-recorded calls from debt collectors. In some cases, a debtor did give the wireless number to the creditor, and in other cases it was not a wireless number when it was given to the creditor – as contemplated by the Edwards Petition. However, in the intervening time period, the wireless number has changed hands, and is now a wireless number assigned to a consumer who is not the debtor. Because the collector believes it is calling the debtor, it provides no way for a person who is not the debtor, to stop the calls.[3] Collectors also call wrong numbers. Collectors also refuse to identity themselves in these prerecorded calls, citing FDCPA provisions prohibiting disclosing the existence of a debt to a third party. These calls often have no way for "human" interaction, and instead inform the called party to return the call to an 800 number. When calling the 800 number, the collector still refuses to identify itself. Consumers in such cases are powerless – the collector will not identify itself so that the consumer can make a request to stop the calls. Denying the Edwards Petition will only increase the number of calls that lack of human interaction (which is precisely what the creditors want) and which is precisely what Congress sought to stop with the TCPA.

I also note that debt collectors have a simple solution that will permit them to call wireless numbers whenever they want – use a live human and not a robot. When a live person is

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[3] The nearly 50,000 comments on this docket are replete with such occurrences. The latest being filed by Andrew Mondics on March 10, 2009. I have also experienced this frustration personally, when my wife was assigned a wireless telephone number by Cingular about 3 years ago, which apparently was previously held by a woman named "Nicole" who had incurred a debt. For over a year, we received prerecorded calls on that wireless number from debt collectors who refused to identify themselves and that we could not stop. We eventually had to get a new wireless phone number to escape the calls.

on the other end of the line, the consumer can tell them that they have a wrong number and to stop calling.[4] It is the automated nature of the calls that is the gravamen of the problem, and what Senator Hollings identified as "telephone terrorism."

CONCLUSION

In conclusion, I respectfully request that the Commission take the following actions:

1. Grant the Edwards Petition in its entirety.

2. Declare that if a telephone number given to a creditor by the consumer in connection with an existing debt was not a wireless telephone number when the consumer provided that number to the creditor, that express permission to call that number if it is ported to a wireless number does not exist, absent an express agreement otherwise between the consumer and the creditor.

3. Declare that express invitation or permission to call a wireless number with a prerecorded message or autodialer can not be transferred to another party by the creditor (or anyone else) without an express agreement between the consumer and the creditor permitting such transfer.

4. Declare that express permission granted to a creditor to call a wireless number extends to the creditors agents, but not to independent contractors and not to third-parties that later acquire the debt, absent an express agreement otherwise between the consumer and the creditor.

5. Reiterate that an EBR or express invitation or permission from a debtor does not permit autodialed or prerecorded calls to be made to a wireless telephone number if that number is subsequently transferred or reassigned to a person who is not the debtor.

6. Reiterate that **all** prerecorded calls, including calls that are not advertisements, must contain the proper, complete, legal identification of the caller, at the beginning of the message, as currently required by 47 C.F.R. § 64.1200(b)(1). The Commission should make clear that this provision expressly applies to all prerecorded calls including both those made with express permission and those made in the context of an established business relationship (including debt collection calls in both instances).

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[4] *See* S. Rep. No. 178, 102nd Cong., 1st Sess. 1991, 1991 U.S.C.C.A.N. 1968 at n.3. (quoting congressional testimony of Mr. Steve Hamm, Administrator of the South Carolina Department of Consumer Affairs, on consumers' frustration at the inability to interact with computerized calls).

7. Require that all autodialed or prerecorded calls made by debt collectors include a mechanism to stop such calls, and that such a request must be honored immediately.

Respectively Submitted, this the 31st day of March, 2009.

/s/ Robert Biggerstaff